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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS OF AMERICA, AFL-CIO, RALPH SCHOENWEIS, E. C. JONES, KENNETH BEST, GEORGE A. CLAYTON, VICTOR COUCH, J. D. EVANS, FLOYD FRIEDLINE, SAMUEL R. GUARINO, MARION HOOPER, JOHN KLADAR, J. A. LANKFORD, JACK LAVITE, FRED G. MARCH, RALPH L. MILLER, RALPH RAMSIER, GEORGE STIMAC, and CHARLES TOWEY, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

STANDARD OIL COMPANY, *Intervenor*
CENTRAL STATES PETROLEUM UNION LOCAL 115, *Intervenor*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit

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Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers of America, AFL-CIO, (hereinafter called Local 483), Ralph Schoenweis, E. C. Jones, Kenneth

Best, George A. Clayton, Victor Couch, J. D. Evans, Floyd Friedline, Samuel R. Guarino, Marion Hooper, John Klader, J. A. Lankford, Jack Lavite, Fred G. March, Ralph L. Miller, Ralph Ramsier, George Stimac and Charles Towey pray that a writ of certiorari issue to review the opinion (A-1-4, *infra*), and judgment (A-5, *infra*) of the United States Court of Appeals for the District of Columbia entered March 2, 1961.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. The decision and order of the National Labor Relations Board (A-6-16, *infra*) is reported at 127 NLRB 223; the decision of the Board in the representation proceeding involved herein is reported at 118 NLRB 1099.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The Court of Appeals denied petitioners' petition for rehearing on March 22, 1961 (A-5, *infra*). On June 1, 1961, Mr. Chief Justice Warren entered an order extending to July 20, 1961, the time for filing a petition for writ of certiorari.

QUESTIONS PRESENTED

The questions presented are:

1. Whether an employer and the incumbent industrial union infringe the right freely to choose a bargaining agent by ceasing to recognize seniority, denying transfer privileges, threatening to terminate and terminating the non-craft employment of eligible voters in a craft severance election.

2. Whether the Board is empowered to legalize contractual arrangements pursuant to which, if the petitioner for severance wins, eligible voters are ousted from jobs within the incumbent's unit and replaced by employees who were not eligible to vote.

3. Whether the Board is empowered to sanction discrimination against employees involved in a severance proceeding by tolling the duty to bargain for them upon filing of the petition.

STATUTE INVOLVED

Principally involved in this proceeding are those sections of the National Labor Relations Act as amended in 1947 (49 Stat. 452, 29 U.S.C., Sections 151 et seq.) (hereinafter the Act) set forth in the Statute Appendix, pp. SA1-SA2, *infra*.

STATEMENT

A. The Stipulated Facts

In October, 1956, two months before expiration of the contract between Central States Petroleum Union (hereinafter CSPU) and Standard Oil Company (hereinafter Standard) covering the operating and maintenance (hereinafter o. and m.) unit at Standard's Wood River refinery, Local 483 filed with the National Labor Relations Board (hereinafter the Board) pursuant to Section 9 (c) of the Act a petition claiming the right to represent "all boilermaker department employees" (A-7-8; J.A. 119, 142, Exh. 2-S).[1] In Board parlance such a petition seeks "craft sever-

[1] References preceding the semicolon are to findings of the Trial Examiner, the Board and the court below; succeeding references are to the evidence. The designation "A." refers to the appendix to this petition; "J.A." references are to the Joint Appendix printed in the court below.

ance[2]. If the Board finds that the petition raises a "real question" of representation it will order an election in which the craftsmen choose between the craft and the industrial union. If the craft union wins, the "craft" is "severed" from the broader unit of which it has until then been a part. If a majority favor the industrial union the craft remains part of the larger unit. Similar terminology and procedure (known as "Globing," from its origin in *Globe Machine & Stamping Co.*, (1937) 3 NLRB 294), applies when a petition seeks to "sever" a plant from a multiplant unit, an employer from a multiemployer unit or a department from a plant unit.[2] Whether a petition for craft severance will be entertained and an election conducted depends on whether the Board finds that the employees involved are a "true craft."[3]

Shortly after the filing of the petition Standard notified CSPU that "to maintain a position of neutrality" it was "suspending all bargaining with you on new working agreement provisions and wages affecting the employees" involved in the boilermaker petition (A-8; J.A. 57-58). Standard thereby invoked the *Midwest Piping* doctrine[4] under which an employer faced with conflicting representation claims is required to refrain from bargaining with either claimant until the "question concerning representation" has been re-

[2] NLRB, *Third Annual Report* (Gov't. Print. Off., 1939), pp. 167-174.

[3] NLRB, *Twenty-fifth Annual Report* (Gov't. Print. Off., 1961), p. 38.

[4] *Midwest Piping and Supply Co.* (1945), 63 NLRB 1060.

solved.[5] CSPU agreed that the *Midwest Piping* doctrine was applicable and added that it would not "bargain with you on the subject of seniority until the Labor Board case [has] been disposed of. Conceivably the outcome * * * could force us to insist that the present seniority system be abandoned completely." (A-8; J.A. 59, Exh. 8-S, J.A. 109).

On May 3, 1957, Standard and CSPU entered into a new contract covering a bargain unit they defined as including "all operating and maintenance employees * * * exclusive of all employees involved in the representation case." (A-3, 8; J.A. 60, 109). The contract recognized the seniority of all employees in the unit and spelled out the historic perquisites of seniority (A-3, 8, 20-22; J.A. 49-52, 55): Employees were not confined to the division or department to which they were regularly attached. When work in a department or division slackened, surplus employees, selected in inverse order of department or division seniority, could elect, in preference to layoff, to "bump" into the "common labor pool". From the pool lay-offs would be made in inverse order of plant seniority when manpower exceeded total operating and maintenance needs. While working in the labor pool, employees were accorded the privilege of "bidding", in order of plant seniority, for permanent jobs and for temporary assignments to premium labor jobs in other

[5] Prior to 1958, however, the Board did not apply this doctrine to bargaining between an employer and an incumbent union, even where the unit petitioned for was coextensive with the existing one. *William D. Gibson Co.* (1954), 110 NLRB 660, overruled in *Shea Chemical Corporation* (1958), 121 NLRB 1027; NLRB, *Twenty-Fourth Annual Report* (Gov't. Print. Off., 1960), p. 60.

departments.[6] Option of return to their regular department or division could be exercised in order of division or department seniority.

CSPU and Standard made an oral "gentleman's agreement" that pending final disposition of the representation case the employees whom they had excluded from the unit by the terms of the May 3, 1957, contract would not, in practice, be denied transfer and bumping privileges, but they made no such agreement with respect to bidding rights (A-8-9; J.A. 60-61, 110).

In the representation case Standard and CSPU contended that the Local 483 petition should be dismissed on the ground that the boilermakers at Wood River were not confined to work on boilermaker jobs and therefore could not be considered a "true craft" (A-18; J.A. 84, 121, 122). In its decision on August 20, 1957, the Board, while noting that at the time the petition was filed 12 of the 42 employees on the boilermaker department seniority list had been "bumped back" and were working in labor pool jobs, rejected the Standard-CSPU contention because (J. A. 121-122) "these assignments result from decreases in work, are temporary in nature and are not considered a part of [boilermakers'] routine duties." (Cf. A. 12-13).

Before the election, which was held on September 19, 1957, CSPU warned the eligible voters that if Local 483 won the "gentleman's agreement" by which their seniority had been recognized would immediately come to an end. (A. 24, 36; J. A. 102). CSPU's President said that it "could not * * * ever agree that members

[6] While attached to the labor pool, employees were paid and classified in accordance with the job they were currently performing (A. 22, n. 5; J.A. 52).

of a separate boilermaker bargaining unit should retain or have seniority or job rights in the operating and maintenance unit". (J. A. 75). Standard said there was "insufficient boilermaker work for all 39 employees on the boilermaker seniority list," and, in view of CSPU's position, it "could see no alternative to the layoff of any persons considered eligible to vote in the boilermaker election for whom there was no boilermaker work available". (J. A. 74). CSPU said that for loss of their work in the labor pool the boilermakers would have only themselves to blame: "it will be only because you have shown by your vote that you want to be treated differently from the rest of the refinery employees". (J. A. 68). Standard said the bumped back boilermakers would be selected for layoff only because of the "employees' own majority decision to sever or cut themselves off from the operating and maintenance unit". (J. A. 86). Local 483 charged that these statements were "intimidatory and coercive," made "to influence the vote in the election" (J. A. 89), and were unlawful. (J. A. 93-94, 96-97).

At the election Standard challenged the eligibility of the seventeen boilermakers who were then working on labor pool jobs (A-9; J. A. 127). Tally of the unchallenged ballots showed nineteen for Local 483 and three for CSPU (A-9; J. A. 81). While the challenge issue was pending before the Board, four bumped back boilermakers, to avoid layoff in the event Local 483 was certified (A-36; J. A. 107), attempted to "bid" into permanent jobs in other departments (A-9-10; J. A. 112-114). Had their seniority been recognized, their bids would have been accepted. (A-23; J. A. 114). Asserting that acceptance would have "an adverse effect on the job rights and earning opportunities of the

members of the operating and maintenance unit whom we have the duty to represent," CSPU insisted that Standard reject these bids (A-24-25; J.A. 111-112, 114), and Standard complied. (*Ibid.*) Local 483 filed timely charges with the Board alleging that denial to the bumped back boilermakers of the benefits of the May 3, 1957, contract was unlawful (J.A. 106-107, 112-114).

On April 2, 1958, the Board overruled Standard's challenges and the votes of the bumped back boilermakers were counted. The revised tally showed 35 votes for Local 483 and 3 for CSPU (A-10; J.A. 99). On April 15, 1958, reiterating that it "would not condone the impairment of hard-won contractual job security rights by permitting seniority to cross bargaining unit boundaries" (J.A. 102), CSPU demanded that the bumped back boilermakers be laid off and replaced by junior employees whose seniority was recognized by the May 3, 1957 contract (A-10, 24; J.A. 102, 106). On April 17, 1958, as soon as Local 483 was certified, Standard did this (A-10; J.A. 105, 106). On April 18, 1958, unfair labor practice charges were filed on behalf of the laid off boilermakers and Local 483 (J.A. 106-107).

B. Opinions Below

The Trial Examiner found it "clear that CSPU caused the Company to remove the 17 employees from their jobs solely because they had elected to be represented by Local 483 in their boilermaker work assignments instead of by CSPU." (A-35, 29). He found that curtailment of the bumped-back boilermakers' seniority, whether treated "as an exclusion of 17 employees from the CSPU contract coverage, as a disparate treatment of a class of employees included in the

unit represented by CSPU, or as a sheer denial of employment" was "discrimination * * * which the Statute forbids" (A-34-35). In his view "No plainer violation of Section 8(a)(3) and 8(b)(2) can be stated" (A-26, 30).

The Board, saying that the Trial Examiner had "over-simplified the matter" (A-11), reversed. It held that severance had the effect of removing the bumped back boilermakers from the CSPU unit, and that CSPU was entitled to take action "detrimental" to them "on behalf of the employees it [still] represents" (A-11). It found the "differentiation in treatment" permissible, in the absence of specific proof of "unlawful animus" on the part of Standard toward Local 483, because it was "based on membership in a unit" (A-14-16), and was therefore "merely an effect of the severance action" (A-11). It held that exclusion of bumped back boilermakers from the May 3, 1957, contract was warranted by the *Midwest Piping* rule (A-13-14, 16), and that after severance craft employees must "look to their chosen bargaining representative with respect to any benefits sought to be obtained * * *" (A-11).

The court below described the *Midwest Piping* rule as requiring "an employer faced with rival representation claims * * * not to bargain with any union *as to the employees involved* in the representation dispute" (A-3, emphasis supplied) and concluded (A-4), that this case "reflects the difficult situations which often arise when craft severance requires readjustment of a highly complex seniority system". It held that the Board's resolution was "reasonable" and constituted "a proper accommodation of the interests which the Act seeks to serve."

REASONS FOR GRANTING THE WRIT

1. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 45-47, 51-52, holds that any disparity of treatment based upon "protected union activity" is unlawful discrimination because the "foreseeable result" is to encourage or discourage that activity. That holding was rejected by the Board and the court below in this case on the ground that here the disparity followed "unit lines" and the union responsible "was not the exclusive bargaining agent of all employees concerned" (A-14-16, 11, 12). The Board relied on the reservation in *Radio Officers* (347 U.S., at 47-48), of the question whether a union can lawfully bargain for benefits only for its constituents where employees "doing the same job" (347 U.S., at 46), "are free to bargain for similar benefits for themselves" (347 U.S., at 47). But that reservation has no relevance where the benefits to the union's constituents are achieved at the expense of other employees. "Such discriminatory contracts are illegal and provide no defense to an action under Section 8 (a) (3)" (347 U.S., at 47-48). "The Union cannot exclude men in order to secure their jobs for others, for this would violate the duty of fair representation."[7]

In *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 773-774, this Court squarely held that the duty of a bargaining agent not to differentiate on forbidden grounds does not stop at the unit line. *Howard* holds that a bargaining agent must "refrain from using its statutory bargaining [position and] power" to take "jobs" away from workers outside its unit "in order to bestow them" on workers within it. Representation by another union in another unit, like race, is a forbidden ground: *Wallace Corp.* v. *NLRB*, 323 U.S.

[7] Blumrosen, *Legal Protection Against Exclusion From Union Activities*, (1961) 22 Ohio S.L.J. 21, 30.

248, 255-256; *Mount v. Grand International Brotherhood of Loc. Eng.*, 6 Cir., 226 F. 2d 604, 607, cert. denied, 350 U.S. 967.

Assuming that severance did remove the bumped back boilermakers from the o. and m. unit, the holding that OSPU was entitled to take action "detrimental" to them "on behalf of the employees it represents" (A-11), is thus in square conflict with *Howard*. It is also in conflict with *NLRB v. International Association of Machinists*, 9 Cir., 279 F. 2d 761, cert. denied, 364 U.S. 890, in which contractual reduction of seniority of employees outside the bargaining agent's unit because they had chosen to be represented by another union on jobs in a different unit was held unlawful.[7]

2. The basic assumption underlying the *Midwest Piping* defense is that when the Local 483 petition was filed the statutory obligation of OSPU to represent boilermakers as part of the o. and m. unit and the statutory duty of Standard to bargain with OSPU about the terms and conditions of their employment ceased. But the Seventh Circuit has recently held that in severance cases the *Midwest Piping* doctrine has no application until the Board finds that the petition raises a "real question" concerning representation and directs an election. *St. Louis Independent Packing Co. v.*

[7] If the unarticulated assumption underlying the Board's position is that OSPU's discrimination against the boilermakers should be excused because Local 483 could obtain a "similar benefit" for them by causing operating and maintenance employees from boilermaker jobs, the short answer is that if there had been any operating and maintenance employees on boilermaker jobs, which there were not, discrimination against them by Local 483 would have been no less violative of the Act than OSPU's discrimination against the boilermakers. Compliance with the prohibition against discrimination "is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22, cf. *RKO Pictures, Inc.*, 61 NLRB 112, 116.

NLRB, June 21, 1961, 7 Cir. F. 2d , 48 LRRM 2469, 2471. This threshold conflict affects the course of collective bargaining in every severance case and should be resolved promptly by this Court. Employers and incumbent unions should not be left to guess whether filing of a severance petition requires cessation of bargaining, for, if it does not, cessation violates the statutory duty to bargain," while if it does, continuation violates the rule.

If certiorari is granted petitioners will argue that in severance cases "neutrality" requires not that the incumbent union and the employer cease bargaining about the eligible voters but that they continue to treat them exactly the same, *vis-a-vis* other employees in the unit, as they have treated them in the past. This, of course, would prevent discrimination either for or against them and would preclude contractual arrangements under which benefits are made contingent upon the outcome of the election. As the Seventh Circuit noted in the *St. Louis Independent case*, *supra*, contractual schemes which do that "tend [ ] to preclude the certification of another union" (48 LRRM, at 2473) and thereby defeat the very object of the *Midwest Piping* rule.

Assuming, *arguendo*, however, that the Board is authorized to toll the duty to bargain about some aspects of employment of eligible voters in severance cases (*e. g.*, wages, it cannot be authorized to sanction disparity of treatment with respect to such matters as seniority, where, because rights and status are relative and interdependent, disparate treatment is necessarily

" *Brooks* v. *NLRB*, 348 U.S. 96, 103; *NLRB* v. *J. W. Rex Company*, 3 Cir., 243 F. 2d 356, 360-361.

and inevitably prejudicial. CSPU itself initially recognized that if bargaining were to proceed without boilermakers during the pendency of the representation case, the subject of seniority for everyone would have to be excluded, p. 5, *supra;* the Board and the court below nevertheless ignored this distinction (see NLRB, *Twenty Fifth Annual Report*, Gov't Print. Off., 1961, p. 65). "We need not pass on the Union's claim that it was not obliged to [bargain about seniority] at all because we are clear that once it undertook to bargain [about seniority] for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because" they were eligible voters. *Conley* v. *Gibson*, 355 U.S. 41, 47. The prejudice resulting from vesting contractual seniority rights and status in everyone but eligible voters (cf. *Zdanok* v. *Glidden Co.*, 2 Cir., decided March 28, 1961, 47 LRRM 2865, 2868-2869), was not overcome by the "gentleman's agreement," for that served only partially to mitigate and to postpone the effects of the discrimination while at the same time compounding the pressure upon eligible voters. *St. Louis Independent case, ibid.* The "gentlemen's agreement" does show, however, that neither the parties nor the Board thought that the *Midwest Piping* doctrine required exclusion of eligible voters from the contractual seniority system.

3. The Board's treatment of the discrimination as a lawful product of unit lines conflicts with another fundamental anti-discrimination principle, namely, that bargaining units must be defined only in terms of jobs, never in terms of personal characteristics, union

affiliations or eligibility to vote.[10] To define inclusions or exclusions from a unit in non-job terms results automatically in disparate treatment of employees "doing the same job" and *ipso facto* violates the bargaining agent's duty of fair representation. Cf. *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774-775.

Nothing in the nature of a severance proceeding could possibly warrant departure from this rule. The *Midwest Piping* policy bars pre-election negotiation only over conditions of employment in jobs which are the subject of the contest. It does not bar employment of eligible voters in jobs which are not the subject of the contest, nor does it authorize denial to them of whatever benefits may apply to or be negotiated for such jobs.[11] If Standard and CSPU had excluded boilermaker *jobs* rather than *eligible voters* from the unit coverage of their contract they would have satisfied the most stringent view of the requirements of *Midwest Piping* without creating any disparity as between eligible voters and other employees doing the same job. By phrasing the exclusion in terms of involvement in the proceeding, and thereby creating the disparity, they produced an election advantage for the contracting union at the expense of its rival, addi-

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[10] A bargaining unit consists of "a related group of jobs which may be held by members or non-members," adherents or opponents, of the union which controls those jobs. Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 Ohio State L.J. 21, 23 (1961); *Carlisle & Jacquelin*, 55 NLRB 678, 680; *H. P. Wasson and Co.*, 105 NLRB 373, 374; *NLRB, Sixteenth Annual Report*, Gov't. Print. Off., 1952, p. 120.

[11] As the Trial Examiner observed, the seniority benefits which CSPU and Standard negotiated in the May 3, 1957 contract "related to" and were an "incident of" labor pool jobs, not boilermaker jobs (A-35).

tionally demonstrating why, in severance as in all other cases, eligibility to vote and the outcome of elections must be kept "off the bargaining table." *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 333-334.

4. The Board was apparently moved to treat ouster of the bumped back boilermakers as a consequence of severance rather than of discrimination by the argument that craftsmen should not be permitted after severance to enjoy any of the benefits of non-craft employment. As Standard put it in its brief below, p. 28, bumped back boilermakers should not be allowed to "effect the severance and thereby cut off the senior boilermakers from the o. and m. unit and not at the same time cut themselves off." But the cut off of contractual bumping and transfer rights between departments occurs by operation of law upon "certification of a different representative." *St. Louis Independent Packing Co.* v. *NLRB*, 48 LRRM, at 2472-2473. In order to make room for the new bargaining agent, the industrial union's contract must cease to apply to the craft jobs.[12] There is, however, no need whatever that it cease to apply to non-craft jobs. Removal of craft jobs from the coverage of the contract by operation of law terminates the contract right of operating and maintenance employees to be assigned to those jobs, just as it terminates the contract right of the craftsmen to bump into operating and maintenance jobs. But this mutual loss of interdepartmental transfer rights does not imply diminution of the statutory right to protection against discrimination. The employer and the incumbent union cannot superimpose on the legal effects of severance additional adverse con-

[12] *Local 1545, United Brotherhood of Carpenters & Joiners of America* v. *Vincent*, 2 Cir., 286 F. 2d 127, 131, n. 5; *American Seating Company*, 106 NLRB 250; *Ludlow Typograph Company*, 113 NLRB 724, 725, 728-729.

sequences merely because they consider such consequences fair and just (J.A. 78, 84, 92, 102).

The question is whether the conduct of the employer and the incumbent union invades rights protected by Section 7, not whether, as the Board thought (A-14, 16), the employer is motivated by anti-union animus on the one hand, or a desire to observe "neutrality" on the other. As this Court recently reiterated, "prohibited conduct cannot be excused by a showing of good faith." *ILGWU* v. *NLRB*, 366 U.S. —, No. 284, October Term, 1960, decided June 5, 1961; *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 802, n. 7, 805; *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 252, 255-256; *Gaynor News Co., Inc.* v. *NLRB*, 347 U.S. 17, 46-48, 51-52.[13]

Where the employer and the incumbent union make continuation of non-craft employment contingent on the outcome of the severance election bumped back craftsmen are compelled to choose between freedom from discrimination in the non-craft jobs they hold and freedom to select a bargaining agent for the craft jobs to which they hope to return. But these rights are independent; both are guaranteed by the Act and loss of one cannot be made the price for enjoyment of the other. One right—to participate in the craft severance election—is accorded in recognition of the craftsman's interest in which union can best bargain with the em-

[13] *Republic* holds that an employer who prohibited wearing of union steward buttons in his plant in order to protect his neutrality thereby violated the Act; *Wallace* holds that an employer who entered into and permitted an incumbent union to enforce a contract under which adherents of a rival union were barred from employment violated the Act, although he opposed the union's policy and was powerless to require it to admit the discriminatees to membership; *Gaynor* holds that an employer cannot lawfully make or perform a contract with an exclusive bargaining agent for disparate treatment of union members and non-members doing the same work.

ployer over terms and conditions in craft jobs. The other—to be free from discrimination—is accorded in recognition of his interest as an individual and a member of a minority group in fair representation and equal treatment by those who control his non-craft job. There is not the slightest inconsistency or conflict between these rights which could preclude their simultaneous existence.

5. In the *St. Louis Independent Packing* case, 48 LRRM, at 2473, the Seventh Circuit held that "The fact that" the severable unit "had been grouped with others for bargaining purposes does not diminish the right of the * * * employees to change their bargaining representative at an appropriate time. The convenience of multi-unit bargaining and master contracts does not warrant infringement upon the rights of employees freely to choose their representative." The holding of the court below that "readjustment of complex seniority systems" does warrant infringement of freedom of choice is squarely in conflict. The question is not limited in importance to craft severance cases, although those bulk large enough.[11] Readjustment is

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[11] Papkin, *Craft Unit Versus Industrial Unit Bargaining Under The National Labor Relations Act* (1960), 29 Geo. Wash. L. Rev. 419, 430; *NLRB* v. *Industrial Rayon Corp.*, 4 Cir., decided June 12, 1961, 48 LRRM 2484.

An unpublished study by the Statistical Analysis Branch, NLRB, dated October, 1959, shows the following volume of Board directed severance elections:

	1954	1955	1956	1957	1958	1959
Severance—craft	28	41	23	22	20	17
Severance—department	14	42	22	18	13	15
Severance—other	0	5	1	4	7	3

These figures do not include cases in which severance petitions were disposed of by consent election, dismissal or withdrawal. Less than 20% of representation petitions are disposed of by Board-directed election. NLRB, *Twenty-Fifth Annual Report*, Gov't Print. Off. (1961) p. 189, table 10.

equally necessary in department, plant and employer severance cases, where seniority systems are also frequently unit wide.[15]

In treating "full freedom" of choice of a bargaining agent (*Hill* v. *Florida*, 325 U.S. 538, 541) as subject to "reasonable" limitations and to the process of "accommodation" the court below confused the guarantee against discrimination based upon exercise of Section 7 rights, which is not subject to administrative or judicial limitation (*Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 26), with organizational activities, such as solicitation of union membership on the employer's property, which are protected by Section 7 only within "reasonable" bounds. Cf. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105. Having in 1947 admonished the Board to allow craftsmen opportunity to decide the severance issue in an election (*American Potash & Chemical Corp.*, 107 NLRB 1418, 1420, 1422-23; S. Min. Rep. No. 105, on S. 1126, p. 11, 1 Leg. Hist. LMRA, 473; 93 Cong. Rec. 3836, 2 Leg. Hist. LMRA, 1009), Congress cannot be deemed to have authorized it to diminish their actual freedom of choice by permitting the election to be made an occasion for discrimination. Protection against discrimination "is an inevitable corollary of the principle of freedom of organization." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 185. The Board cannot sanction any abridgment of the voter's freedom to cast his ballot "without imperilling [his] livelihood" or "affecting his job". *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40, 42.

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[15] *Analysis of Layoff, Recall, and Work-Sharing Procedures in Union Contracts*, U.S. Dept. of Labor Bull. No. 1209 (1957), p. 25, Tables 18 and 19.

6. The impact of this decision upon craft severance is as broad as it is devastating. A bumped back craftsman's non-craft job is his current source of livelihood.[16] To sanction his ouster from that job if a majority vote for severance is virtually to compel him to vote against it, for "the desire of employees to unionize is directly proportional to the advantages thought to be gained from such action." *Radio Officers' Union* v. *NLRB*, 347 U.S., at 46, 51-52.

As the court below observed, situations in which temporarily bumped back craftsmen are eligible to vote in severance elections "often arise." Interdepartmental bumping is a common feature of collective bargaining contracts in integrated industry. Bumping is provided for in "54% of agreements * * * the percentage being higher in manufacturing (63 per cent), lower in non-manufacturing (27 per cent) * * *. Almost ⅗ of bumping provisions allow plant-wide bumping." BNA, Collective Bargaining Negotiations and Contracts, Sections 60:241, 75:5; *Analysis of Layoff, Recall, and Work-Sharing Procedures in Union Contracts*, U.S. Dept. Labor Bull. No. 1209 (1957), p. 27. In all such cases, bumped-back craftsmen may hold the balance of power in the election as they did here.

Review now is necessary if the right to craft severance is to survive. Unless this decision is reversed, the General Counsel of the Board will consider himself bound by it and will not issue complaints on charges of discrimination predicated on termination of eligible voters' non-craft employment. Since the General Counsel's refusal to issue a complaint is not reviewable,

[16] At the time of the election six of the bumped-back boilermakers had not worked on boilermaker jobs for a year to two years (A. 22; J.A. 127-128).

either by the Board or by the courts,[17] no occasion to consider the Board's approach will be presented.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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[17] *Bandlow* v. *Rothman*, D.C. Cir., 278 F. 2d 866, cert. denied 364 U.S. 909; *Hourihan* v. *NLRB*, D. C. Cir., 201 F. 2d 187, 188, cert. denied 345 U.S. 930.